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SUPREME COURT, U.S.

NO. 81-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORRIS CARLTON TAYLOR,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTIONS PRESENTED

I. WERE THE DEFENDANT'S FIFTH OR SIXTH AMENDMENT RIGHTS VIOLATED WHEN THE PROSECUTOR WAS GIVEN ACCESS TO A PSYCHIATRIC REPORT WHICH WAS USED IN CROSS-EXAMINING A DEFENSE EXPERT DURING TESTIMONY WHEN THE REPORT HAD BEEN PREPARED PURSUANT TO MENTAL EXAMINATIONS REQUESTED BY THE DEFENDANT TO DETERMINE THE DEFENDANT'S CAPACITY TO STAND TRIAL AND TO EXPLORE THE POSSIBILITY OF THE EXISTENCE OF MITIGATING CIRCUMSTANCES?

II. DID THE TRIAL COURT'S REFUSAL TO REQUIRE THE JURY TO LIST ON THE VERDICT SHEET WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III. MUST THE DEFENDANT'S SENTENCE OF DEATH BE VACATED BECAUSE ONE OF THREE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY WAS SET ASIDE BY THE APPELLATE COURT?

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STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Norris Carlton Taylor and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Norris Carlton Taylor was tried, convicted, and received a sentence of death in the Superior Court of New Hanover County. In an opinion reported in State v. Taylor, ___ N.C. ___, 283 S.E. 2d 761 (1981), the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WERE THE DEFENDANT'S FIFTH OR SIXTH AMENDMENT RIGHTS VIOLATED WHEN THE PROSECUTOR WAS GIVEN ACCESS TO A PSYCHIATRIC REPORT WHICH WAS USED IN CROSS-EXAMINING A DEFENSE EXPERT DURING TESTIMONY WHEN THE REPORT HAD BEEN PREPARED PURSUANT TO MENTAL EXAMINATIONS REQUESTED BY THE DEFENDANT TO DETERMINE THE DEFENDANT'S CAPACITY TO STAND TRIAL AND TO EXPLORE THE POSSIBILITY OF THE EXISTENCE OF MITIGATING CIRCUMSTANCES?

II. DID THE TRIAL COURT'S REFUSAL TO REQUIRE THE JURY TO LIST ON THE VERDICT SHEET WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III. MUST THE DEFENDANT'S SENTENCE OF DEATH BE VACATED BECAUSE ONE OF THREE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY WAS SET ASIDE BY THE APPELLATE COURT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States:

AMENDMENT V (in relevant part)

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

AMENDMENT VI (in relevant part)

In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§15A-2000(b) Sentence Recommendation by the Jury. - Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.
>
> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."

"§15A-2000(c) Findings in Support of Sentence of Death- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."

STATEMENT OF THE CASE

On September 1, 1978, Norris Carlton Taylor, an escapee from the Johnston County Jail where he was being held for the murder of Kathiline Ann Mansullo aka Kathy King (R. 345-347)[1], and a fugitive from Virginia for a series of kidnappings, robberies, assaults, and a murder (R. 352-371), was arrested in Woodland, North Carolina after a high speed chase and was charged with, among other things, the murder and armed robbery of Mildred Murchison (who was four months pregnant) (R. 167), and the kidnapping of, armed robbery of, and assault with intent to kill inflicting serious bodily injury on Malcolm Biles, all of which occurred September 1, 1978 (R. 10). Taylor was also charged with the August 28, 1978 kidnapping and rape of Jewel Taylor.[2]

On September 5, 1978, Norris Taylor was found to be indigent and the Public Defender of Cumberland County was appointed to represent him (R. 1).

On January 8, 1979, the petitioner's counsel petitioned the court to have Taylor evaluated for competency to stand trial,

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[1]Taylor was later convicted of the first degree murder of Kathiline Mansullo: State v. Taylor, 298 N.C. 405, 259 S.E. 2d 502 (1979).

[2]Taylor was later convicted on these charges, but the North Carolina Supreme Court reversed as to the kidnapping charge: State v. Taylor, 301 N.C. 164, 270 S.E. 2d 409 (1980).

for the presence of any mitigating circumstances, and for a possible insanity defense. (R. 268-269). The court granted the petition and ordered that Taylor be evaluated by Dr. Bob Rollins, Chief of the Forensic Psychiatric Services for the State of North Carolina, who submitted a report to petitioner's counsel and a letter to the court pursuant to G.S. §15A-1002(d). Taylor was found competent to stand trial.

On March 5, 1980 true bills of indictment were returned by the Cumberland County Grand Jury charging Norris Carlton Taylor with the murder and armed robbery of Mrs. Murchison (78 CRS 41453) and the kidnapping of, armed robbery of, and the assault with a deadly weapon with intent to kill, inflicting serious bodily injury on Malcolm Biles (78 CRS 6426). These cases were consolidated for trial, and, on January 30, 1979, the court granted the petitioner's motion for a change of venue, and ordered the cases transferred to New Hanover County for trial. (R. 57).

On May 28, 1979 Norris Carlton Taylor was brought to trial. The State presented evidence showing the following: On August 30, 1978, Patty Bazemore was accosted by the petitioner in Woodland, North Carolina. At gunpoint, he forced her to drive with him, in her automobile, to Fayetteville, where they spent the night in a park. The next day petitioner told Bazemore that they would leave her car and try to obtain another, because petitioner was afraid the police would be looking for the Bazemore automobile. Petitioner was unsuccessful in his efforts to secure another car, and that night, August 31, 1978, Bazemore and petitioner slept on a railroad track. On the morning of September 1, 1978, petitioner left Bazemore in a downtown park, warning her not to move, and went to obtain a car.

Clarence Edward Davis testified for the State that he was in the parking lot of the Cardinal Building in Fayetteville on

the morning of September 1, 1978. As he watched, he saw a man whom he identified as petitioner come out from behind a building, cross a wall and approach a young woman, later identified as Mrs. Murchison, who had just parked her car. Davis testified that the two argued, the petitioner apparently wanting her pocketbook and car keys. As Mrs. Murchison turned away, Davis said he heard two gunshots and saw Mrs. Murchison stagger. Petitioner fled in Murchison's car, a tan 1976 Buick Electra 225 with two doors, passing within fifteen to twenty feet of Davis.

Petitioner then returned to where he had left Bazemore and ordered her into the car. Within five minutes petitioner and Bazemore abandoned the car, went to the bus station nearby and took a taxi to the Eutaw Shopping Center. Across the street from the shopping center was a Winn Dixie grocery store, and in the parking lot of that store defendant approached Malcolm Biles. Petitioner told Biles that he had had car trouble, and Biles offered to help. Once in Biles' car, a 1974 Cadillac Coupe de Ville, petitioner brandished a handgun and ordered Biles to drive. After driving for a time, petitioner ordered Biles to stop the car. Petitioner then locked Biles in the trunk of the car and began driving. Biles became uncomfortable in the trunk and began to make noise by beating on the trunk with the tire iron. Petitioner stopped the car, ordered Biles into the back seat, and drove on. A short time later petitioner turned off onto a dirt road, forced Biles into the woods and shot him.

Petitioner then drove into the town of Woodland, North Carolina, and released Patty Bazemore. As petitioner drove out of town, he was observed by Roosevelt Britt, a part-time Woodland police officer. Petitioner was captured after a high-speed chase and taken to the Sheriff's Department in Jackson, North Carolina.

Just prior to the close of the State's evidence, the court conducted a competency hearing. Over the objection of the petitioner, the court permitted the prosecutor to have a copy of Rollins' report concerning his mental examination of Taylor.

The petitioner was declared competent to proceed with the trial, and elected to put on no evidence. The jury found the petitioner guilty of the first degree murder of Mrs. Murchison on the basis of the felony murder rule with the armed robbery being the underlying felony, and the kidnapping, armed robbery, and assault with a deadly weapon with intent to kill on Malcolm Biles. The court then held a sentencing hearing.

The State presented evidence showing the petitioner's 1969 conviction in the Commonwealth of Virginia for the rape of Susie Crews (R. 344), the murder of Alberta Updike in November, 1975 in Virginia (confessed to by Taylor) (R. 352, 376-383), the aiding and abetting the rape of Sandra Johnson in March, 1976 in Virginia by Taylor (R. 355), the attempted robbery and assault with a deadly weapon on Renee Hinton in March, 1976 by Taylor (R. 359), and Taylor's fleeing to North Carolina to evade arrest on that charge (R. 358,369); the rape, kidnapping and assault with a deadly weapon on Tina Baker and the kidnapping and assault with a deadly weapon on Robert Rawls by Taylor; the January 2, 1978 murder of Kathy King in Selma, North Carolina by Taylor (R. 366) and his subsequent conviction for that offense (R. 345); his fleeing to Virginia to evade arrest for the King murder and subsequent arrest in Newport News, Virginia (R. 369); the escape by Norris Carlton Taylor from the Johnston County, North Carolina jail where he was being held, by use of a deadly weapon on July 14, 1978 (R. 347,369); the August 28, 1978 kidnapping and repeated raping of Jewel Taylor by petitioner (R. 373-376), the August, 1978 kidnapping and robbery of Richard Lee Taylor in Virginia by the petitioner (R. 321); the August 30, 1978

kidnapping, robbery and attempted rape of Patricia Ann Sullivan in Virginia by the petitioner (R. 315-319), and the August 30, 1978 kidnapping, robbery and rape of Patricia Bazemore in Woodland, North Carolina by the petitioner (R. 215-227). There was also evidence presented that these repeated acts of violence and Mrs. Murchison's death and Malcolm Biles' kidnapping, robbery, and assault were all part of an attempt by the petitioner to avoid or prevent a lawful arrest or to effect his escape from custody.

The petitioner put on evidence in mitigation through Dr. Rolf Fisscher, who had examined Taylor, that Norris Taylor was emotionally or mentally disturbed at the time the capital felony was committed, and that his capacity to conform his conduct to the requirements of law at the time of the offense was impaired. The District Attorney cross-examined Fisscher using Dr. Rollins' report concerning Taylor's competency (R. 413-421). After presenting further evidence in mitigation, the defense rested.

The court instructed the jury concerning the jury's duty to determine punishment and gave the jury a written verdict form to complete. The jury was told that it need not indicate on the form which mitigating circumstances it found (R. 477). The jury found three statutory aggravating circumstances existed: that Taylor had previously been convicted of a felony involving the use or threat of violence to the person; that the murder was committed while Norris Taylor was engaged in the commission of the felony of robbery, and that the murder was committed for pecuniary gain (R. 476). The jury also found one or more mitigating circumstances existed (R. 477). The jury then found the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, and the mitigating circumstance or circumstances were insufficient to outweigh the aggravating circumstances. (R. 477). The jury

recommended imposition of the death penalty as to the murder; therefore, the court imposed a sentence of death.

On appeal to the North Carolina Supreme Court, the Supreme Court ruled that one of the statutory aggravating factors found had been improperly submitted to the jury, but ruled the submission harmless error. Likewise, the Court ruled that certain evidence had been improperly submitted during the penalty phase, but found that to be harmless error as well: State v. Taylor, ____ N.C. ____, 283 S.E. 2d 761 (1981).

REASONS WHY THE WRIT

SHOULD NOT ISSUE

1. ESTELLE V. SMITH, _____ U.S. _____, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981) DOES NOT REQUIRE THAT A PETITIONER WHO REQUESTS PSYCHIATRIC EXAMINATION BE WARNED THAT THIS STATEMENTS TO THE PSYCHIATRIST WOULD BE USED AGAINST HIM. LIKEWISE, THERE IS NO CONSTITUTIONAL ERROR IN THE STATE'S HAVING ACCESS TO THE REPORT OF THE PSYCHIATRIST WHO EXAMINED THE PETITIONER UNDER THOSE CONDITIONS.

As the first prong of his three part argument that this Court should grant certiorari to review his case, Norris Carlton Taylor argues that his case presents a question about the implication and reach of Estelle v. Smith, ____ U.S. ____, 68 L.Ed. 2d 359, 101 S.Ct. 1866 (1981), and further that the use by the State of psychiatric reports made by a State psychiatrist to cross-examine another psychiatrist constitutes constitutional error. However, since the matter now before the Court is so dissimilar to Estelle v. Smith, supra, and since any error in the prosecutor's use of the report was harmless, this Court ought not issue its writ to review these issues.

Estelle v. Smith, supra dealt with the situation where Smith was compelled by court order to have a psychiatric

examination. He did not ask for it. The State then used the results obtained as a part of the examination as direct evidence during the penalty phase on the issue of the petitioner's future dangerousness. The petitioner in Estelle v. Smith, supra, had put on no evidence in regard to mental capacity.

In the situation now before the Court, the petitioner requested an examination on competency, on possible mitigating factors, and on possible insanity defense. During the penalty phase of the trial, the petitioner put on evidence of his mental condition in order to show the mitigating circumstances of the capital felony's having been committed while the defendant was under the influence of mental or emotional disturbance: G.S. §15A-2000(f)(2), and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired: G.S. §15A-2000(f)(6). Only on cross-examination of the defense psychiatric expert, after an attempt by petitioner to prove the existence of these mitigating factors, did the State employ the State psychiatrist's report.

The Fifth Amendment to the Constitution states no one shall be compelled to be a witness against himself. However, that right, like any right, may be waived. In Conquest v. Mitchell, 618 F.2d 1057 (4th Cir. 1980), cert. denied, 449 U.S. 878 (1980), Judge Haynsworth, in his concurrance, stated that when a prisoner voluntarily submits to examination by a psychiatrist for the State, as opposed to being involuntarily examined [see Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978)], he has waived his Fifth Amendment privilege. However, the State of North Carolina does not rely solely on the request for examination to prove waiver. In Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), a case relied on heavily by petitioner,

the Court, while not finding waiver in the request for the examination, stated that waiver of the Fifth Amendment privilege would be found when--as in the matter now before this Court--the petitioner put on evidence of mental condition. The Court stated:

> "A different situation was present in United States v. Cohen, 530 F.2d 43 (5th Cir.), cert. denied 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed. 2d 130 (1976). In Cohen, the federal government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defense. In this situation, this Court held that the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's Fifth Amendment privilege in the same manner as would the defendant's election to testify at trial. Cohen, like virtually every other federal and state court addressing this issue, concluded that any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." 655 F.2d at 701-702.

Thus, even under the Fifth Circuit's interpretation of Estelle, the petitioner waived his Fifth Amendment privilege in regard to the results of his psychiatric examination when he put on his evidence of mental problems during the penalty phase of the trial.

The petitioner also complains of the manner of the prosecutor's use of the psychiatric report--that by injecting hearsay into the penalty phase, the petitioner's constitutional rights were violated. However, as noted in State v. Taylor, ____ N.C. ____, 283 S.E. 2d 761 (1981), the evidence elicited by the improper use of the reports was elicited in that manner by the defense as well as the prosecution. Thus, the evidence of which the petitioner complains was introduced by him as well as by the State. This, then, is clearly harmless error beyond a reasonable doubt, to the extent it can even be considered a violation of any constitutional right possessed

by the petitioner. Chapman v. California, 365 U.S. 610, . 5 L.Ed. 2d 828, 81 S.Ct. 776 (1965).

Therefore, since the matter now before the Court is so dissimilar to Estelle v. Smith, supra, and since any error in the use of the evidence complained of is harmless, there is no reason for this Court to issue its writ to review these matters.

2. THERE IS NO CONSTITUTIONAL REQUIREMENT PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENT THAT THE JURY SPECIFY ON THE VERDICT FORM WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND.

The petitioner, in requesting that this Court's writ issue to the Supreme Court of North Carolina, argues that the trial court's failure to require that the jury list on the verdict form which mitigating circumstances it found results in a denial of his Constitutional rights. Such an assertion is meritless and ought not be the basis for this Court to grant certiorari.

At the outset, it should be noted what is--and what is not--at issue. The jury instructions in State v. Taylor, supra, as well as the North Carolina statutory scheme, G.S. §15A-2000 (b), require the sentencing jury to consider each of the mitigating circumstances which could conceivably arise from the evidence (R. 462-463). Thus, the requirement of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978), that a sentencer in a capital case must not be precluded from consideration of relevant mitigating factors, is met in this case.

What is at issue is simply whether the jury must, after finding mitigating factors, specifically record each factor on the verdict sheet instead of indicating generally that mitigating circumstances were found. Neither North Carolina law nor the United States Constitution require such a listing by the jury. G.S. §15A-2000(d); State v. Rook, ____ N.C. ____, 283 S.E. 2d 756 (1981).

In Gregg v. Georgia, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976); and Jurek v. Texas, 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950 (1976), this Court approved the

death penalty statutes from Florida, Texas, and Georgia which provided the sentencer with what this Court felt was constitutionally permissible limited and guided discretion. These statutes, while in some aspects different from each other, all required the finding of certain elements in aggravation and consideration of any possible elements in mitigation. These statutes also require judicial review of all aspects of the sentencing.

Neither the Texas nor the Georgia statutes nor the case law interpreting these statutes require a specific listing by the jury of each mitigating factor found: GA. Code Ann. §27-2534.1(c); TEXAS CODE CRIM. PRO. 37.071.

In Texas, in fact, the statute does not even explicitly speak of mitigating circumstances, but rather directs the jury to answer three questions regarding punishment after certain aggravating circumstances had been found to exist by virtue of a guilty verdict. The Court found that in reaching the answers to the questions, evidence in mitigation would be considered, and that that was enough to render the statute constitutional. Jurek v. Texas, supra.

The petitioner argues that the North Carolina statutory scheme whereby aggravating circumstances must be specifically listed and mitigating circumstances not listed renders the appellate proportionality review constitutionally inadequate. However, the North Carolina statutory scheme is strikingly similar to Georgia's death penalty statute: State v. Rook, supra, and the Georgia statute, upheld by this Court in Gregg v. Georgia, supra, requires no written findings of mitigating factors, although it does require specific written findings of the aggravating circumstances: GA. Code Ann. §27-2534.1(c) (1978).

It follows that if Georgia's statute and Texas' statute, both found constitutional by this Court, require no written

findings of each mitigating circumstance found by the jury, there is no constitutional requirement for North Carolina to require the jury to list each mitigating factor the jury may find. As stated by Justice Carlton, speaking for the Court in State v. Rook, supra:

> "On appeal, the Georgia Supreme Court is required to review the sentencing procedure to determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> Ga. Code Ann. §27-2537(c)(1978). Thus, because the Georgia statute requires specific findings only on aggravating circumstances, appellate review of the above-listed issues is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury.
>
> As stated above, the United States Supreme Court has examined the Georgia procedure for imposition of the death penalty and found it to be constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859. Our statutory scheme is strikingly similar to Georgia's, in that our sentencing review is limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. Georgia's scheme has been fully reviewed by the United States Supreme Court and has been declared constitutional; our statute is likewise constitutional. It follows, then, that there exists no constitutional requirement of specific findings on mitigating circumstances and that failure of the trial court to instruct the jury to make specific findings was not error."

Therefore, the Respondent State of North Carolina submits that a writ of certiorari should not issue to review this matter.

involves whether or not one aggravating factor which was found from the evidence for sentencing ought not to have been submitted to the jury. None of the evidence which was used to reach the legal conclusion as to the presence of the statutory aggravating circumstance was rendered inadmissible by the Appellate Court's finding that G.S. §15A-2000(e)(5) ought not to have been charged upon. All that evidence was relevant for the purpose of finding G.S. §15A-2000(e)(6), that the capital felony was committed for pecuniary gain.

In the present matter before this Court, a legal conclusion was reached from the evidence that three aggravating circumstances existed. The evidence was then analyzed by the jury to determine whether the factors in aggravation were sufficiently substantial to warrant a death penalty: G.S. §15A-2000(b).

Thus, the invalidity of one of the aggravating elements had no possible impact upon whether the death penalty could be imposed in this case because there remained two valid aggravating circumstances found by the jury.[2] Either of the two remaining circumstances would properly have served as the basis for consideration of capital punishment in this case. Likewise, the finding of invalidity as to one aggravating circumstance had no practical impact upon whether the death penalty should be imposed since the invalidatating of the one aggravating factor had no effect whatsoever upon the evidence which was before the jury. Since the evidence received in this matter was not rendered inadmissible by the invalidatating of one statutory aggravating element, the North Carolina

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[2]From the evidence, the trial court should also have charged on the statutory aggravating element G.S. §15A-2000(e)(4), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. This error was, of course, favorable to the petitioner.

3. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEATH PENALTY BE SET ASIDE, WHEN MORE THAN ONE AGGRAVATING CIRCUMSTANCE IS FOUND BY THE JURY TO WARRANT THE IMPOSITION OF THE DEATH PENALTY, BECAUSE ONE AGGRAVATING CIRCUMSTANCE IS SET ASIDE.

LIKEWISE, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEATH PENALTY BE SET ASIDE SIMPLY BECAUSE SOME EVIDENCE ADMITTED DURING THE SENTENCING HEARING WAS IMPROPERLY SUBMITTED.

As his last reason for requesting that certiorari issue to the Supreme Court of North Carolina, the petitioner argues that his constitutional rights to due process and to freedom from cruel and unusual punishment were violated when the North Carolina Supreme Court found that while submission of one of the aggravating factors to the jury was erroneous, the submission constituted harmless error, as did submission of certain evidence during the penalty phase of his trial. These reasons also do not merit the granting of a writ of certiorari.

Unlike Stromberg v. California, 283 U.S. 359, 75 L.E. 1117, 51 S.Ct. 532 (1931) or Williams v. North Carolina, 317 U.S. 287, 87 L.E. 279, 63 S.Ct. 207 (1942), the matter before this Court does not involve one of several possible grounds for conviction proving unconstitutional.[1] Instead, this matter

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[1]See the dissent of Justice White, in the denial of certiorari in Drake v. Zant, 449 U.S. 999 (1980) wherein he stated, at page 1003:

> "The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either Stromberg v. California, [supra], or Street v. New York, [supra]. The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

Supreme Court properly found this to be harmless error beyond a reasonable doubt. Chapman v. California, 365 U.S. 610, 5 L.Ed. 2d 828, 81 S.Ct. 776 (1965). The finding of an aggravating circumstance makes it proper for a jury to consider capital punishment. However, it is the evidence presented both in aggravation and mitigation, not number of aggravating circumstances found, which determines whether the death penalty is appropriate.

The evidence introduced at the penalty phase which petitioner alleged was improperly introduced likewise constitutes harmless error since the bulk of the testimony concerning Taylor's prior crimes and especially his confession detailing them revealed him to have been a fugitive from justice for the last several years with each crime of violence building on the other in his attempts to avoid apprehension as he went back and forth between Virginia and North Carolina. This evidence clearly went to the statutory aggravating offense of committing the capital offense for the purpose of avoiding or preventing a lawful arrest. G.S. §15A-2000(e)(4). See State v. Taylor, ___ N.C. ___, 283 S.E. 2d 779 (1981).

The small quantum of evidence improperly admitted which did not fall within one of the statutory aggravating elements was simply too innocuous compared to the other, properly admitted evidence to be considered other than harmless error: Chapman v. California, supra.

This Court has before it presently the issue which petitioner seeks to raise in this argument in Zant v. Stephens, ___ U.S. ___, cert. granted October 5, 1981. There is no need for this Court to grant its writ in this matter to determine that question.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Norris Carlton Taylor's petition for writ of certiorari should be denied.

Respectfully submitted, this 26th day of January, 1982.

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Joan Herre Byers, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record for Petitioner Norris Carlton Taylor, by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Ms. Mary Ann Tally
Suite 307, 117 Dick Street
Fayetteville, North Carolina 28301

This the 26th day of January, 1982.

Joan Herre Byers
Assistant Attorney General

NO. 81-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORRIS CARLTON TAYLOR, Petitioner, v. STATE OF NORTH CAROLINA, Respondent.	AFFIDAVIT OF MAILING

STATE OF NORTH CAROLINA

COUNTY OF WAKE

JOAN HERRE BYERS, being sworn, states:

1. I am an Assistant Attorney General for the State of North Carolina representing the Respondent, State of North Carolina.

2. On January 26 , 1982, at approximately 4:00 p.m. EST, I personally placed the original and nine copies of the enclosed Response to Petition for Writ of Certiorari to the Supreme Court of North Carolina in an envelope properly addressed to the Clerk of this Court, with express mail service postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service within the City of Raleigh, State of North Carolina.

Joan H. Byers

Joan Herre Byers

Sworn to before me this

26th day of January, 1982.

Dianna W. Mashburn (Asst.)

Notary Public

My Comm. Expires: Sept. 23, 1984

DIANNA W. MASHBURN NOTARY PUBLIC CARTERET COUNTY, N.C.